SHDKT PROCEEDINGS AND ORDERS

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SHORT TITLE: [Kinder, Larry]
VERSUS [United States] DATE DOCKETED: [121191]
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1	Dec 11 1991	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Dec 26 1991		Waiver of right of respondent United States to respond filed.
4	Jan 9 1992		DISTRIBUTED. January 24, 1992
5	Jan 21 1992	P	Response requested -- WHR. (Due February 21, 1992)
7	Feb 14 1992		Order extending time to file response to petition until March 23, 1992.
9	Mar 23 1992		Brief of respondent United States in opposition filed.
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8	Mar 26 1992		REDISTRIBUTED. April 17, 1992
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15	May 18 1992		REDISTRIBUTED. May 22, 1992
17	May 26 1992		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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IN THE

ORIGINAL

SUPREME COURT OF THE UNITED STATES

NO. 91-6658

LARRY KINDER,

Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**
(Court of Appeals No. 90-8579)

Of Counsel:

ALFORD & GASSAWAY, P.C.

Linda M. Gassaway
Attorney for Petitioner
Larry Kinder

ALFORD & GASSAWAY, P.C.
801 Washington, Suite 503
Waco, Texas 76701
(817) 757-2777
State Bar No. 14421100

IN THE

SUPREME COURT OF THE UNITED STATES

NO.

LARRY KINDER, Petitioner

VS.

UNITED STATES OF AMERICA, Respondent

**PETITION FOR WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

The Petitioner, LARRY KINDER, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on October 21, 1991.

QUESTIONS PRESENTED

QUESTION NUMBER ONE

The Court of Appeals erred in holding the evidence sufficient to support the amount of drugs used to determine the base offense level.

QUESTION NUMBER TWO

The Court of Appeals erred in upholding the Trial Court's increasing the Defendant's base offense level because of his managerial role.

QUESTION NUMBER THREE

The Court of Appeals erred in failing to require the specific performance of the Plea Bargain Agreement or requiring the Defendant to be allowed to withdraw his plea of guilty.

QUESTION NUMBER FOUR

The Court of Appeals erred in upholding the Trial Court's refusal to credit the Defendant with two points for acceptance of responsibility.

QUESTION NUMBER FIVE

The sentence concerning a Schedule II controlled substance is illegal.

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OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, as yet unreported, appears at Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was rendered on October 21, 1991. Jurisdiction to review said judgment herein by writ of certiorari is conferred on this Court by 28 U.S.C.A. 1254 (1).

MATERIAL FACTS AND PROPER RAISING OF QUESTIONS IN LOWER COURT

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The Defendant is charged in a one-count Indictment alleging violation of Title 21, United States Code Section 846 and 841(a)(1)--Conspiracy to Possess More than 100 Grams of Methamphetamine With Intent to Distribute Same. The one-count Indictment alleges that beginning from at least as early as February 7, 1990, the exact date unknown and continuing until on or about February 14, 1990, in the Western District of Texas, Larry Kinder, David Kinder, and Sandra Shook did unlawfully, willfully and knowingly combine, conspire, confederate and agree with each other to possess more than 100 grams of methamphetamine, a Schedule II Controlled Substance, with intent to distribute same, contrary to Title 21, U.S.C. Section 841(a)(1) and in violation of Title 21 U.S.C. Section 846. (R. 1 p. 21-22). On June 25, 1990, the Defendant entered a plea of guilty to the single-count Indictment. (R. 3). A plea of guilty was pursuant to a plea agreement that

called for the Defendant to enter a plea of guilty to the Indictment in exchange for the United States Attorney agreeing to refrain from prosecuting the Defendant for other Title 21 U.S.C. violations of which the United States was then aware, which may have been committed by the Defendant in the Western District of Texas. (R. 1 p. 37-38)

The Defendant was sentenced to 210 months imprisonment and five years supervised release and was assessed $50.00 and fined $5,000.00. (R. 1 p. 59-62)

B. Statement of Facts

According to the Government's case on February 8, 1990, Sandra Kay Shook negotiated a methamphetamine purchase from a Texas Department of Public Safety Narcotics Investigator who was working in an undercover capacity. The methamphetamine purchase was to be for Larry Kinder. Shook attempted to buy a smaller quantity of methamphetamine than the undercover agent had, but when this was rejected, she agreed and continued with negotiations for approximately 269 grams of methamphetamine. The negotiations ended on February 8, 1990, with Shook indicating that she would get back to the undercover agent. On February 14, 1990, a meeting was arranged with the same undercover officer. At that meeting, Larry Kinder met with the officer and negotiated a price for the purchase of the 269 grams of methamphetamine. The price agreed on and paid by Larry Kinder was $5,800.00. David Kinder was present during part of the negotiations and transactions. While there, David Kinder obtained a small quantity of the 269 grams of

methamphetamine and injected it into his body to ascertain the quality of the product. David Kinder then left the motel room with the remaining 269 grams of methamphetamine and was arrested with it on his person. The United States Attorney would further show that the methamphetamine was being purchased by the individuals for subsequent resale in the Western District of Texas. The negotiations and purchase took place in Waco, McLennan County, Texas. The methamphetamine had been tested by the Texas Department of Public Safety Laboratory and was in fact methamphetamine. (R. 1 p. 39-40)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

INVOLVED AND DISCUSSED

GROUND OF ERROR NUMBER ONE

The Court of Appeals erred in holding the evidence sufficient to support the amount of drugs used to determine the base offense level.

The evidence supporting attribution to the Defendant of an amount of drugs beyond that of the particular transaction of conviction is based upon insufficient evidence. That evidence consists of a statement by Larry Kinder concerning the amount of drugs representing accounts receivable. This statement was made merely to explain why cash for the purchase transaction was not produced earlier and was in the nature of puffery.

GROUND OF ERROR NUMPER TWO

The Court of Appeals erred in upholding the Trial Court's increasing the Defendant's base offense level because of his managerial role.

Under the evidence it is just as likely as not that the Defendant was acting in a dominant role as boyfriend and as older brother in relation to his Co-defendants, and not in the role of manager in relation to the drug conspiracy.

GROUND OF ERROR NUMBER THREE

The Court of Appeals erred in failing to require the specific performance of the Plea Bargain Agreement or requiring the Defendant to be allowed to withdraw his plea of guilty.

In describing the offense for which the Defendant would be prosecuted, the Plea Bargain Agreement stated as if it were the only offense under Title 21 for which the Defendant would be prosecuted based upon the facts at hand. At a later point in the

sentencing process the Defendant was informed that the Government intended to punish him for an additional seventeen ounces of methamphetamine as complained about in Ground of Error Number One. Neither the Agreement, the Factual Basis, nor the discovery conducted up to that time revealed Larry Kinder's allegedly incriminating statement nor the Government's intention to use it in prosecution. The Government should be held to its agreement.

GROUND OF ERROR NUMBER FOUR

The Court of Appeals erred in upholding the Trial Court's refusal to credit the Defendant with two points for acceptance of responsibility.

The Sentencing Guidelines create a presumption of acceptance of responsibility upon entry of a plea of guilty. The two-point award should not be denied simply because the Government chose not to avail itself of the Defendant's offer to debrief.

GROUND OF ERROR NUMBER FIVE

The sentence concerning a Schedule II controlled substance is illegal.

Methamphetamine has not been properly reclassified as a Schedule II controlled substance.

ARGUMENT AND AUTHORITIES

Ground of Error Number One

The Court of Appeals erred in holding the evidence sufficient to support the amount of drugs used to determine the base offense level.

The amount of drugs attributable to the Defendant was a highly disputed sentencing factor. The factual basis states that the Defendant was involved with the purchase of 269 grams of methamphetamine. (R. 1 p. 39-40). Ultimately, however, the Government attributed an additional approximate 476 grams or 17 ounces of methamphetamine to the Defendant for a total of 750.95 grams. The 750.95 grams results in a base offense level of 30 (PSR par. 19), whereas the 269 grams of the offense transaction stipulated and agreed to yields a base offense level of 26. U.S.S.G. Section 2D1.1(a)(3) and (c)(9)

The Defendant objected to the increased quantity of drugs (Objections to PSR NO. 1). The objection states that the Defendant was charged and pled guilty to distributing approximately 269 grams of methamphetamine to an undercover agent. The transaction the Defendant pled guilty to occurred on or about February 14, 1990. The Defendant was involved in the delivery of $5,800.00 to the undercover officer and received 269 grams in return for the money.

In determining the level, the Probation Department added approximately 476 grams or 17 ounces because of the statement the undercover officer said Larry Kinder made to the undercover officer as to why he did not complete an earlier transaction. The reason given was that Larry Kinder "had seventeen ounces on the street".

That statement is the only evidence indicating Larry Kinder to be in possession of more than 269 grams.

Nonetheless, the Trial Court allowed the inclusion of the additional 17 ounces in the calculation of the total substance weight for sentencing and the Court of Appeals upheld that decision.

The factual basis for the pleas as well as the discovery material provided to the Defendant did not include any mention of the alleged statement. The objection concludes by asserting that Larry Kinder's statement lacked sufficient indicia of reliability to establish the Defendant's possession of more than 269 grams. (Objection to PSR No. 1)

The Presentence Report states that on February 8, 1990, an undercover officer and confidential informant were working together to infiltrate a suspected methamphetamine organization involving Larry Kinder. (PSR par. 4-6). On that date Larry Kinder told the confidential informant that he was interested in a buy but only needed one-quarter pound of methamphetamine since Larry Kinder still had eight ounces unsold. (PSR par. 7)

Forty five minutes later, Co-defendant Shook called to advise that she and Larry Kinder had approximately $2,600.00 and were waiting to be paid for some previously purchased methamphetamine. (PSR par. 8). An hour later, Co-defendant Shook again advised the undercover agent that she and Larry Kinder still had eight ounces of methamphetamine unsold. (PSR par. 9) An hour later, Shook called to advise the agent that she and Larry Kinder now had

$3,400.00 being only $800.00 additional to the original $2,600.00.

On February 14, 1990, the undercover agent consummated the sale of one-half pound of methamphetamine from the Defendant for $5,800.00. Larry Kinder explained to the undercover officer that he had not wanted to purchase a full one-half pound on February 18, 1990, because he still had seventeen ounces on the street for which he had not collected all of the money. Larry Kinder's statement concerning the seventeen ounces in the only evidence to support a total drug weight attribution to the Defendant of 750.95 grams. This evidence lacks sufficient indicia of reliability on which to base such a finding.

The standard for review concerning drug quantity determinations under U.S.S.G. Section 2D1.1 for violations of 21 U.S.C. Section 841(a) are set out in U.S. vs. Angulo, 927 F.2d 202 (5th Cir. 1991).

Citing Townsend vs. Burke, 68 S. Ct. 1252 (1948), (the Defendant) argues that this information was not accurate enough to afford him due process.

Due process does require that information relied upon when determining an appropriate sentence have "some minimal indicium of reliability" and bear "some rational relationship" to the decision to impose a particular sentence. U.S. vs. Vontsteen, 910 F.2d 187, 190 reh'g granted on other grounds, 919 F.2d 957 (5th Cir. 1990) cert. denied. --U.S.-- 111 S. Ct. 801, 112 L.Ed.2d 862 (1991). The guidelines provide that in resolving any disputed fact the court may consider any information that has "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. Section 6A1.3, p.s. Enactment of the guidelines has not restricted the district court's wide discretion in the type and source of information it may consider when imposing a sentence. Vonsteen, 910 F.2d at 190; see also 18 U.S.C. Section 3661.

If information is presented to the sentencing judge with which the defendant would take issue, the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable. Vonsteen, 910 F.2d at 190 (citing U.S. vs. Flores, 875 F.2d 1110 (5th Cir. 1989);

see also U.S. vs. Alfaro, 919 F.2d 962 (5th Cir. 1990) (party seeking adjustment to sentence level must establish factual predicate justifying adjustment). Furthermore, the district court need only determine its factual findings at sentencing by a "preponderance of the relevant and sufficiently reliable evidence". Alfaro, 919 F.2d at 965. Specific factual findings about the quantity of drugs to be used in setting the base offense level are reviewed on appeal only for clear error. U.S. vs. Pierce, 893 F.2d 669 (5th Cir. 1990).

Id., at 204-205.

Should this Court determine that the Trial Court's finding to support the amount of drugs beyond 269 grams is not clearly erroneous under a preponderance of evidence standard, the Defendant would urge the application of the burden of proof by clear and convincing evidence in this case.

Requiring proof by clear and convincing evidence provides greater due process protections at sentencing so as to more closely resemble the protections afforded at trial, especially regarding those sentencing proceedings and the findings made therein that are as (or indeed even more) important as the adjudication of guilt itself. See McMillan vs. Pennsylvania, 106 S. Ct. 2411 (1986); U.S. vs. Kikumura, 918 F.2d 1084 (3rd Cir. 1990). The Defendant developed the inherent unreliability of Larry Kinder's statement to the undercover officer at the sentencing proceeding. Darryl Moore testified as to what the undercover officer told him that Larry Kinder had said to the undercover officer about the amount of drugs that remained accounts receivable, thus constituting double hearsay. (R. 4 p. 6-8).

On cross examination Moore admitted that he had no independent evidence to corroborate that Larry Kinder had seventeen ounces on

the street. Moore admitted that at times as acting as an undercover narcotics agent, he found it necessary to make up stories to appear to have more money, more drugs, or more power in order to negotiate drug deals. Moore further admitted that the mere fact that the statement was made by Larry Kinder is possibly no proof bearing on whether he had an additional seventeen ounces on the street. Rather the statement was more probative as to Larry Kinder's delivering an excuse for not having money to cover up the fact that perhaps he was not as major a drug dealer as he would like to appear to be to the undercover agent.

The Court of Appeals considered other evidence of Larry Kinder's high volume sales corroborative of the statement abqut the 17 ounces. Such a conclusion ignores the point that Larry Kinder's statement about the 17 ounces has been shown to not have sufficient indicia of reliability upon which to base the inclusion of that specific amount of substance in the sentencing equation. If the Trial Court intended to rely upon information concerning the volume of the Kinder operation, then it should have applied the Sentencing Guidelines set out immediately below which specifically address drug quantity estimations and not the inherently unreliable statement of Larry Kinder.

U.S.S.G. Section 2D1.1 Application Note 12 for 21 U.S.C. Section 841(a) and Section 2D1.4 Application Note 2 for 21 U.S.C. Section 846 provide guidance concerning reliable evidence to be considered in making drug quantity determinations. " Where ... the amount seized does not reflect the scale of the offense, the

sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant..." Id.

Evidence of price or general financial information does not support a finding of the additional amount of seventeen ounces. On February 8, 1990, Co-defendant Shook and Larry Kinder made statements that they had $2,600.00 cash and eight ounces still on the street. The statement concerning the eight ounces suffers from the same inherent unreliability as argued above concerning Larry Kinder's statements about the seventeen ounces; nonetheless, within a week Larry Kinder had raised an additional $3,200.00 cash. Considering that one-half pound wholesaled for $5,800.00, the collection within a week's time by Larry Kinder of an additional $3,200.00 as a secondary wholesaler from his retailers on the street does not even support a finding that Larry Kinder and Shook had half a pound out on the street, much less an additional seventeen ounces. This conclusion is based upon the original wholesale price between Larry Kinder and the undercover agent of $5,800.00. Certainly the secondary wholesaler collects more from his retailers than he paid for the product from his own supplier. The amount of money collected between February 8 through 14, 1990, is inconclusive as to the actual amount of drugs sold, if any, during the course of any alleged conspiracy, but in any event, the amount collected further demonstrates the unreliability and

inaccuracy of Larry Kinder's statement about the additional seventeen ounces and the finding of such as a fact in support of the total amount of drugs attributed to the Defendant.

Ground of Error Number Two

The Court of Appeals erred in upholding the Trial Court's increasing the Defendant's base offense level because of his managerial role.

The Presentence Report labeled the Defendant as a manager and recommended the award of two additional points in his offense level determination. This determination was based upon the Defendant's control of funds and decisions regarding the drug purchase. (PSR par. 21). The Defendant objected to this finding (Objections to PSR No. 3), which was overruled (R. 1 p. 42) and then upheld by the Court of Appeals. App. A, p. 556-557.

The Defendant developed at sentencing the relationship between the Defendant and his co-defendants which the government used to determine the Defendant was a leader.

The Defendant and Co-defendant Shook had a personal relationship as boyfriend and girlfriend. The Defendant and David Kinder had a personal relationship as well, being brothers. The offense conduct described in the Presentence Report demonstrates that Co-defendant Shook was as much involved in the contacts and negotiations with the undercover agent prior to the actual transaction as the Defendant was. The same can be said for the Defendant and his Co-defendant brother at the actual transaction. Co-defendant, David Kinder, carried the money, tested the drug and carried it out of the motel room. (PSR par. 12). If it can even be said that the Defendant was the more dominant character in relation to his Co-defendants, it is just as likely (if not more likely) that this dominance, if any, arises from the nature of

their personal relationship. It is not probative of any managerial capacity in the offense conduct.

Between the Defendant and Co-Defendant Shook, the male is dominant in many romantic relationships. As between the Defendant and Co-defendant, David Kinder, an older brother with a high school education and the oldest child of six siblings is more likely than not to be more dominant than a younger brother without a high school degree. (PSR p. 1 and par. 52 and 57--Larry Kinder; PSR p. 1 and par. 69 and 75--David Kinder).

Under a preponderance of the evidence standard, U.S. vs. Casto, 889 F.2d 562 (5th Cir. 1989) cert. denied, 110 S. Ct. 1164 (1989), the government has failed in its burden of persuasion in seeking an enhancement of the sentence. U.S. vs. McDowell. 888 F.2d 285 (3rd Cir. 1989); U.S. vs. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989) cert. denied, 110 S. Ct. 346 (1989); U.S. vs. Wilson, 884 F.2d 1355 (11th Cir. 1989).

Defendant urges this Court to grant this petition so that this case may be remanded for resentencing with instructions that the two-point penalty for a leadership role be deleted from the Defendant's base offense level computation.

Ground of Error Number Three

The Court of Appeals erred in failing to require the specific performance of the Plea Bargain Agreement or requiring the Defendant to be allowed to withdraw his plea of guilty.

The Defendant and the U.S. Attorney entered into a Plea Bargain Agreement in this case which reads in pertinent part:

"In exchange for Defendant's plea, the United States Attorney agrees to refrain from prosecuting Defendant for other Title 21, United States Code, violations of which the United States is now aware, which may have been committed by the Defendant in the Western District of Texas. That is, this action now pending is the extent of the Federal prosecution against the Defendant in the Western District of Texas based upon all facts at hand." (R. 1 p. 38)

This agreement was signed and entered on June 25, 1990 (R. 1 p. 37-38) With reference to the "facts at hand" (R. 1 p. 38), the U.S. Attorney filed a Factual Basis describing 269 grams of methamphetamine as being involved in the offense of conviction on June 25, 1990, as well. (R. 1 p. 39-40).

The Government used a statement by Larry Kinder about an additional seventeen ounces to support a finding of 750.95 grams of methamphetamine. See Ground of Error Number One, supra. The Factual Basis for the pleas as well as the discovery material provided to the Defendant did not include any mention of that alleged statement. (Objections to PSR No. 1) Certainly, the alleged statement which Larry Kinder categorically denies (See Objections to PSR No. 1, Larry Kinder; R. 4 p. 5) having been made

to the undercover agent on February 14, 1990, was known to the Government at the time of the preparation of the Plea Bargain Agreement and Factual Basis on or before June 25, 1990.

If prosecutors are to be permitted to encourage pleas of guilty by offering a benefit to defendants, then in return the system must respect the intent and purpose of the agreement. See U.S. vs. Johnson, 697 F.2d 54 (5th Cir. 1982). Some minimal and meaningful consideration must support the agreement if the Government can agree to not prosecute Title 21 violations, but yet can effectively reach the same ends as additional prosecution via the sentencing mechanism.

The Government has offered no additional or meaningful consideration to support the agreement. Analogous to promissory estoppel, plea bargaining must have more substantiality than mere expectation and hope. It must have explicit expression and reliance and is measured by objective, not subjective, standards. Johnson vs. Beto, 466 F.2d 478 (5th Cir. 1972)

Obviously, the Defendant relied upon the Government's representation that he would be prosecuted for the instant drug violation only based upon all the facts at hand. It follows that "all facts at hand" consist of the facts contained in the Factual Agreement entered contemporaneously with the Plea Bargain Agreement.

If this Honorable Court does not enforce the Plea Bargain Agreement by specific performance by limiting the amount of drugs used to calculate the base offense level to 269 grams, then this

Plea Bargain Agreement is reduced to a "mere expectation and hope" that the Government will not go behind the obvious import of its agreement and effectively prosecute and punish the Defendant for other Title 21 violations via the sentencing mechanism.

By agreeing to enter a plea of guilty, the Defendant gave very substantial consideration in support of the agreement. This Honorable Court should protect the Defendant's voluntariness of waiver of his Fifth Amendment Rights by granting this petition and enforcing the Plea Bargain Agreement against the Government to the effect the parties' obvious intent.

Otherwise, and in the alternative, the Defendant was induced by the Government to enter into the Plea Bargain Agreement by a material misrepresentation that the amount of drugs for purposes of determination of the base offense level would be limited to 269 grams of methamphetamine as reflected by the statement in the agreement, "based upon all facts at hand" (R. 1 p. 38).

In the event of misrepresentation, the Defendant's plea was made involuntarily and he should be allowed to withdraw it. U.S. vs. Weiss, 599 F.2d 730 (5th Cir. 1979)

Ground of Error Number Four

The Court of Appeals erred in upholding the Trial Court's refusal to credit the Defendant with two points for acceptance of responsibility.

The government did not recommend an award of two (2) points for acceptance of responsibility under Sentencing Guidelines Section 3E1.1. (PSR Par. 16-18) The Defendant objected to this recommendation. (Objection to PSR #2) The sentencing court rejected the objection and did not award the two (2) points. (R 1 p. 59)

A defendant is not entitled to a two-point reduction unless he clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the criminal conduct. U.S. vs. Nevarez-Arreola, 885 F.2d 243 (5th Cir. 1989)(per curiam). Whether a defendant has accepted responsibility is a factual question based largely upon an appraisal of the defendant's sincerity. U.S. vs. Thomas, 870 F.2d 174 (5th Cir. 1989). The standard for review is even more deferential than a pure clearly erroneous standard. U.S. vs. Fabregat, 902 F.2d 331 (5th Cir. 1990).

Application Note 3 to the Commentary of Section 3E1.1 of the Federal Sentencing Guidelines effectively creates a presumption in favor of the Defendant for award of the two points. Furthermore, to require the Defendant to admit to incriminating conduct at all is a violation of his Fifth Amendment rights. The Defendant here made incriminating statements in attempting to obtain the two-point award. There is no showing on the Record that the Defendant was admonished as to the effect of waiving his Fifth Amendment rights

in discussing the incriminating conduct with the Government or its agents, nor that the waiver of rights was intelligently and voluntarily made. The inclusion of voluntary and truthful admission is a violation of the Fifth Amendment right. Accordingly the fact of a guilty plea must stand as a presumption which has not been rebutted by the information gained in an unconstitutional manner which the Government asserts does not constitute complete voluntary and truthful admission to the Defendant's conduct surrounding the offense of conviction. The Court of Appeals does not address this aspect of the argument at all and again repeats the Probation Department's basis for recommending denial of the reduction. Furthermore, the Court of Appeals holds against the Defendant the legal argument promoted in Ground of Error No. One.

Additionally, Application Note 1 of that same Commentary details appropriate considerations in determining the Defendant's qualifications for the two-point award which include under Note 1.(e) voluntary assistance to authorities.

The Defendant offered to debrief, which offer the Government rejected. (R 4 p. 15-17) The Government should not be allowed to defeat the two-point award by the rejecting the Defendant's offer of assistance.

This Court should grant this petition and overturn the clearly erroneous determination.

Ground of Error Number Five

The sentence concerning a Schedule II controlled substance is illegal.

Under Title 21 U.S.C. Section 812, methamphetamine is included within Schedule III as a noninjectable liquid.

Methamphetamine is listed in Schedule II of 21 U.S.C. Section 812 as an injectable liquid only. The evidence shows methamphetamine to exist in a powder form for the purpose of distribution. (PSR par. 12)

The Defendant additionally submits that the evidence is not sufficient to prove the allegations of methamphetamine as a Schedule II Controlled Substance and, therefore, this Court should remand the case and order the Trial Court to correct the sentence imposed in this case.

The Defendant respectfully submits that the Attorney General has never promulgated the reclassification of methamphetamine.

In 1970 Congress passed the Comprehensive Drug Abuse Prevention and Control Act which delegated to the Attorney General authority to reclassify controlled substances. 21 U.S.C. Section 811.

Notice was published in the Federal Register at 36 Fed.Reg. 9563, by the Director of the Bureau of Narcotics and Dangerous Drugs proposing the transfer, among other things, of methamphetamine, from Schedule III to Schedule II of the 1970 act. Later that reclassification was accomplished on July 7, 1971. See 36 Fed.Reg. 12734.

However, the Attorney General's power to reschedule controlled substances was never transferred to the Bureau or its Director and therefore the Director lacked the authority to reclassify methamphetamine from a Schedule III to a Schedule II Controlled Substance in 1971.

In 1973, the Attorney General did delegate his authority to the Drug Enforcement Agency. See Fed.Reg. 18380; 28 C.F.R. Section 0.100. The Attorney General's sub-delegation of authority, however, cannot be applied retroactively, and therefore the rescheduling of methamphetamine by the Director of the Bureau was unlawful.

After the delegation of authority from the Attorney General in 1973, the Director of the Drug Enforcement Agency republished the result of the Director of the Bureau's acts in the Federal Register in 1974. See 39 Fed.Reg. 22142.

In essence, the Director of the Bureau of Narcotics and Dangerous Drugs did not have sub-delegation authority from the Attorney General to reclassify controlled substances in 1971. The Director of the DEA did not adhere to the required provisions of the Drug Abuse Prevention and Control Act of 1970 when, in 1974 he republished the findings of the Director of the Bureau of Narcotics and Dangerous Drugs reclassifying methamphetamine as a Scheduled II controlled substance and thus methamphetamine has never been lawfully classified as a Schedule II Controlled Substance but instead remains a Schedule III Controlled Substance pursuant to the provisions of the 1970 Act. See U. S. vs. Widdowson, 916 F.2d 587

(10th Cir. 1990); Caudle vs. U. S., 828 F.2d 1111 (5th Cir. 1987); U. S. vs. Granberry, 89 F.2d 1974 (5th Cir. 1990); U. S. vs. Jones, 852 F.2d 1235 (9th Cir. 1988); U. S. vs. Kendall, 887 F.2d 240 (9th Cir. 1989); U. S. vs. Burnes, 816 F.2d 1354 (9th Cir. 1987); U.S. vs. Gordon, 580 F.2d 827 (5th Cir. 1978); 36 Fed.Reg. 12734-12736.

Thus, the Defendant submits the evidence is insufficient to prove methamphetamine is a Schedule II Controlled Substance and the Trial Court erroneously set sentence in this cause based upon the sentencing provisions in relationship to a Schedule II rather than a Schedule III Controlled Substance. This Court should therefore remand this cause for resentencing.

CONCLUSION

The Petitioner, Larry Kinder, respectfully urges this Court to grant this Writ and to reverse his conviction or in the alternative, to adjust his sentence or to specifically state the reasons for its conclusion, set aside the sentence and rēmand the case for further sentencing proceedings with such instructions as this Court considers appropriate and to order any other further relief to which this Court believes him to be entitled. See 18 USC Section 3742 (e)(2)(a).

Respectfully submitted,

Linda M. Gassaway
Attorney for Petitioner
of
ALFORD & GASSAWAY, P.C.
801 Washington Suite 503
Waco, Texas 76701
(817) 757-2777

UNITED STATES of America, Plaintiff-Appellee,

v.

Larry KINDER, Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

David KINDER, Defendant-Appellant.

Nos. 90-8579, 90-8580.

United States Court of Appeals, Fifth Circuit.

Oct. 21, 1991.

Defendants entered guilty pleas to conspiring to possess methamphetamine with intent to distribute and were sentenced in the United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., and defendants appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) district court properly included noncharged 17 ounces of methamphetamine as relevant conduct under federal Sentencing Guidelines; (2) defendants were not entitled to reduction in base offense levels for acceptance of responsibility; and (3) remand was required to enable court to sentence defendant under less severe section of statute under rule of lenity.

Affirmed in part and remanded in part.

1. Criminal Law ⇐986.2(1)

Information used in sentencing must have some indicia of reliability. U.S.S.G. § 6A1.3(a), p.s., 18 U.S.C.A.App.

2. Criminal Law ⇐986.2(1)

District court has wide discretion in evaluating reliability of information used in sentencing and whether to consider it.

3. Criminal Law ⇐986.1

Defendant who objects to use of information for purposes of sentencing bears burden of proving that it is materially untrue, inaccurate or unreliable.

4. Criminal Law ⇐1158(1)

For purposes of application of federal Sentencing Guidelines which permit enhancement of sentence based upon quantity of drugs involved in crime, appellate court reviews for clear error district court's specific factual findings of quantity of drugs. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, as amended, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. § 2D1.1(a)(3), (c)(7, 9), 18 U.S.C.A.App.

5. Criminal Law ⇐1313(2)

Trial court's decision to include additional noncharged 17 ounces of methamphetamine as relevant conduct under federal Sentencing Guidelines for purposes of sentencing defendant who pled guilty to charge of conspiring to possess more than 100 grams of methamphetamine with intent to distribute was not clearly erroneous; court adopted findings of presentence report which related defendant's statement that he had 17 ounces of methamphetamine on the street and such statement was corroborated by informant. U.S.S.G. § 2D1.1(a)(3), (c)(7, 9), 18 U.S.C.A.App.

6. Conspiracy ⇐51
Criminal Law ⇐1244

Trial court was entitled to consider additional noncharged 17 ounces of metham-

phetamine as relevant conduct under federal Sentencing Guidelines in sentencing defendant who pled guilty to charge of conspiring to possess more than 100 grams of methamphetamine with intent to distribute, even though it was codefendant who stated that he had 17 ounces of methamphetamine "on the street"; evidence supported conclusion that both defendants worked together in conspiracy and thus court was entitled to infer that defendant knew extent of conspiracy and amounts of methamphetamine being distributed. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, as amended, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. §§ 1B1.3, comment. (n.1), 2D1.1(a)(3), (c)(7, 9), 18 U.S.C.A.App.

7. Criminal Law ⇐273.1(2)

Government did not violate plea agreement in which defendants pleaded guilty to charge of conspiring to possess more than 100 grams of methamphetamine with intent to distribute, by recommending inclusion of additional noncharged 17 ounces of methamphetamine in sentencing under federal Sentencing Guidelines; Government kept promise to prosecute only 269 grams involved in transaction and inclusion of other 17 ounces for purposes of sentencing was not equivalent to prosecution. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, as amended, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. § 2D1.1(a)(3), (c)(7, 9), 18 U.S.C.A.App.

8. Criminal Law ⇐273.1(2)

Defendants' guilty pleas to charge of conspiring to possess more than 100 grams of methamphetamine with intent to distribute were not rendered involuntary by Government's alleged misrepresentation that base offense level would be based on only 269 grams of methamphetamine; district court informed both defendants of maximum possible statutory punishment they faced. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, as amended, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. § 2D1.1(a)(3), (c)(7, 9), 18 U.S.C.A.App.

9. Criminal Law ⇐1311

Defendant bears burden of proving to district court that he is entitled to downward adjustment in his sentence under federal Sentencing Guidelines. U.S.S.G. § 3E1.1(a), 18 U.S.C.A.App.

10. Criminal Law ⇐1252

Defendants were not entitled to reduction in base offense levels under federal Sentencing Guidelines, following entry of guilty pleas to charges of conspiring to possess more than 100 grams of methamphetamine with intent to distribute, based upon acceptance of responsibility; both defendants denied culpability for any criminal conduct beyond specific offenses charged. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

11. Drugs and Narcotics ⇐43

Statute providing for penalties for possession of methamphetamine was not unconstitutionally vague, though one section provided for ten years to life sentence if offense involved at least 100 grams of methamphetamine, or at least 100 grams of mixture containing methamphetamine, whereas other section provided for imprisonment of only 5-to-40 years if offense involved at least ten grams of methamphetamine or at least 100 grams of mixture containing methamphetamine; Congress clearly defined conduct prohibited and defendants knew they faced imprisonment of at least five years. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1), (b)(1)(A)(viii), (b)(1)(B)(viii), as amended, 21 U.S.C.A. § 841(b)(1), (b)(1)(A)(viii), (b)(1)(B)(viii).

12. Conspiracy ⇐51

Criminal Law ⇐1181.5(8)

Remand was required to enable district court to resentence defendant, who pled guilty to charge of conspiring to possess more than 100 grams of methamphetamine with intent to distribute, under subsection of statute which carried less severe penalty, in compliance with rule of lenity. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 201(c), Schedule II, 401(b)(1)(A)(viii), (b)(1)(B)(viii), as amended, 21 U.S.C.A. §§ 812(c), Schedule II, 841(b)(1)(A)(viii), (b)(1)(B)(viii).

13. Attorney General ⇐6

Attorney General followed proper procedures in reclassifying methamphetamine as Schedule II controlled substance, pursuant to the Comprehensive Drug Abuse Prevention and Control Act; Attorney General properly delegated his authority to the Director of the Bureau of Narcotics and Dangerous Drugs (BNDD) who then reclassified methamphetamine. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 101–1017, 201(a), 202(a), (c), Schedules II, III, as amended, 21 U.S.C.A. §§ 801–970, 811(a), 812(a), (c), Schedules II, III.

14. Drugs and Narcotics ⇐46

Methamphetamine is classified as Schedule II substance regardless of whether it is in powder or liquid form. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 101–1017, 201(a), 202(a), (c), Schedules II, III, as amended, 21 U.S.C.A. §§ 801–970, 811(a), 812(a), (c), Schedules II, III.

15. Criminal Law ⇐1251

Evidence was sufficient to support district court's two-point enhancement of defendant's sentence, following guilty plea on charge of conspiring to possess methamphetamine with intent to distribute, under the federal Sentencing Guidelines for being "organizer, leader, manager, or supervisor" of criminal activity; informants advised authorities that defendant was in charge of codefendant, codefendant informed undercover officer at initial meeting that she took care of defendant's dope business for him, and during transaction with undercover officer, defendant negotiated with officer and instructed codefendant to test drugs and pay money to officer. U.S.S.G. § 3B1.1(c), 18 U.S.C.A.App.

Appeals from the United States District Court For the Western District of Texas.

Before THORNBERRY, DAVIS, and WIENER, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

David and Larry Kinder appeal their guilty pleas and sentences for conspiring to possess methamphetamine with intent to distribute. Because both appellants were sentenced under the harsher of two overlapping penalty provisions, we remand so the district court may resentence according to the rule of lenity. We affirm the district court on all other issues.

I.

In February 1990, the Texas Department of Public Safety (TDPS), the Waco Police

Department, and the Drug Enforcement Agency (DEA) investigated the distribution of methamphetamine around Waco, Texas. They believed that Larry Kinder (Larry) and Sandra Kay Shook were major methamphetamine dealers in the area. A confidential informant had told Officer Floyd Goodwin of the TDPS that Larry was looking for a methamphetamine supplier. The informant also told officer Goodwin that Shook sold methamphetamine and collected the proceeds for Larry but that Larry controlled the operation. According to the informant, Larry sold between eight ounces and one pound of methamphetamine per week in the Waco area.

Working undercover, Officer Goodwin commenced negotiations on February 8, 1990 to sell methamphetamine to Larry. After a few phone calls between Larry, Shook, and Goodwin, Shook went to Goodwin's hotel room. Shook told Officer Goodwin that she took care of most of Larry's "dope business" for him and discussed the possibility of purchasing a quarter-pound of methamphetamine from Goodwin. Goodwin told Shook that the $2,600 offered was not worth his time and declined to sell. Shook told Officer Goodwin that they did not need more because they still had eight ounces of unsold methamphetamine, but that they would be back later in the evening with more money.

A short time later Larry phoned Goodwin to say that he was trying to raise the money to buy a half-pound of methamphetamine. An hour later, however, Shook called Goodwin and told him that they had only $3,400. Goodwin told Shook that he would not break open his one-pound package for that. Shook told Goodwin that Larry would want at least a half-pound of methamphetamine by the next week.

On February 14, 1990 Officer Goodwin was informed that Larry was "ready to do business" by buying a half-pound. That evening, Larry and his brother David Kinder (David) went to Goodwin's hotel room. Larry told Goodwin that he had not wanted to buy a large amount of methamphetamine the week before "because he had 17 ounces of methamphetamine on the street and had not collected all of the money from the sale of [it]." Larry told Goodwin that he wanted to buy a half-pound now and would possibly want more later. Larry then instructed David to give Goodwin some bundles of money, and informed Goodwin that there was $5,800 in the bundles.

Officer Goodwin then had the informant retrieve the half-pound of methamphetamine from a dresser drawer. Larry told David to test the substance. David did so, first by snorting some and then by injecting some into his arm with a syringe. When Goodwin asked if the methamphetamine was good enough, David nodded his head enthusiastically. Larry instructed David to take the half-pound outside and wait for him (Larry). Officer Goodwin then gave an arrest signal and Larry and David both were arrested.

Larry and David pled guilty to a one-count indictment of conspiring to possess more than 100 grams of methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(a)(1) (1988).[1] In exchange for the pleas, the government promised not to prosecute appellants for any additional offenses. At the sentencing hearing, the district court denied all of appellants' objections to the Presentence Investigation Report (PSR). The court included the non-charged 17 ounces of methamphetamine, of which Larry had spoken, when calculating the appellants' base offense level. Larry was sentenced to 210 months imprisonment, five years supervised release, a $5,000 fine, and a $50 mandatory assessment. David was sentenced as a career offender to 400 months imprisonment, five years supervised release, and a $50 mandatory assessment. These timely appeals followed.

1. The indictment also charged Sandra Kay Shook, but she is not part of this appeal.

II.

A.

Both appellants contend first that the district court relied on insufficient evidence when including the non-charged 17 ounces (481.93 grams) of methamphetamine as relevant conduct. The inclusion of this additional 17 ounces resulted in raising appellants' base offense level from 26 to 30 under U.S.S.G. §§ 2D1.1(a)(3), (c)(7), and (c)(9) (Nov.1989).

[1–4] Information used in sentencing must have some indicia of reliability. U.S.S.G. § 6A1.3(a); *United States v. Vontsteen*, 910 F.2d 187, 190 (5th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 801, 112 L.Ed.2d 862 (1991), *reh'g granted en banc on other grounds*, 919 F.2d 957 (5th Cir.1990). The district court has wide discretion in evaluating the reliability of the information and whether to consider it. *United States v. Angulo*, 927 F.2d 202, 205 (5th Cir.1991). A defendant who objects to the use of information bears the burden of proving that it is "materially untrue, inaccurate or unreliable." *Id.* We review only for clear error the district court's specific factual findings of the quantity of drugs involved. *Id.*

[5] Here, the trial court's decision to include the extra 17 ounces was not clearly erroneous. The court adopted the findings of the PSR. The PSR, in turn, related Larry's statement to Goodwin that he (Larry) had 17 ounces of methamphetamine "on the street" as preventing him from having ready cash to buy methamphetamine offered for sale. Appellants argue that this statement is the only evidence of an additional 17 ounces and that the statement is unreliable because it was mere "puffery" on the part of Larry to boost his credibility with Goodwin. The record belies appellants' assertion. Officer Darryl Moore, who worked with Goodwin on the investigation, testified that he had information concerning "multiple ounces" sold by Larry. Larry's high sales volume is also supported by Goodwin's informant, who told Goodwin that Larry sold from eight to sixteen ounces of methamphetamine a week.

Appellants also argue economics. They argue that if they had 17 ounces of methamphetamine on the street Larry could have easily raised $5,800, the purchase price for one-half pound of the drug. The argument has at least two flaws. First, it assumes that Larry was devoting all of his available cash to this proposed purchase. Second, it assumes that Larry was able to collect on all of his accounts receivable in one week, a formidable task for any businessman. This economic argument is meritless.

[6] David also contends separately that no evidence links him to the additional 17 ounces of methamphetamine. He argues further that no evidence was produced that supports a conclusion that he could have foreseen that Larry distributed this additional quantity of drugs.

The district court was entitled to consider "conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." U.S.S.G. § 1B1.3(a)(1), Commentary, Application Note 1. The additional 17 ounces were connected to the February 14 transaction (to which David clearly participated) because of Larry's explanation as to why he could not consummate the deal on February 8. Moreover, the evidence supported a conclusion that David worked closely with Larry in the conspiracy. David brought the money to the February 14 transaction, tested the drugs, and took possession of the drugs, all on behalf of the conspiracy. The district court was entitled to infer that David knew the extent of the conspiracy and the amounts of methamphetamine being distributed. *United States v. Vela*, 927 F.2d 197, 201 (5th Cir.1991), *cert. denied*, 1991 WL 131773, — U.S. —, — S.Ct. —, — L.Ed.2d — (US).

B.

[7] Appellants next contend that the government violated their plea agreement not to prosecute them for additional offenses by recommending inclusion of the additional 17 ounces in sentencing. We disagree. The government promised to prosecute only the 269 grams involved in the February 14 transaction, and kept that promise. Inclusion of the other 17 ounces in sentencing is not equivalent to prosecution. *United States v. Rodriguez*, 925 F.2d 107, 112 (5th Cir.1991).

[8] Appellants argue in the alternative that their pleas were rendered involuntary by the government's alleged misrepresentation that their base offense level would be based on only 269 grams. This, too, is without merit. The guilty pleas were voluntary because the district court informed both appellants of the maximum possible statutory punishment they faced. *United States v. Pearson*, 910 F.2d 221, 223 (5th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 977, 112 L.Ed.2d 1062 (1991).

C.

[9] Appellants also maintain that the district court's refusal to reduce their base offense levels by two levels for acceptance of responsibility was clearly erroneous. The Guidelines provide that such a decrease is warranted if the defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1(a) (Nov.1989). A defendant bears the burden of proving to the district court that he is entitled to the downward adjustment. *United States v. Mueller*, 902 F.2d 336, 347–48 (5th Cir.1990). Our review of the district court's ruling is "even more deferential than a pure clearly erroneous standard." *United States v. Fabregat*, 902 F.2d 331, 334 (5th Cir.1990).

[10] Here both appellants have denied their culpability for any criminal conduct beyond the specific offense charged. Larry initially claimed he was "pressured" into committing the offense and that the purchase money was not derived from prior drug transactions. David denied knowing that Larry planned to purchase methamphetamine on February 14, and also denied testing the drug; he insisted that he was simply "using it." Both appellants continue to deny any involvement in the extra 17 ounces. Thus the district court was entitled to conclude that appellants were not entitled to the reduction for acceptance of responsibility.

D.

Appellants next contend that they are entitled to reversal because 21 U.S.C. § 841(b)(1) is unconstitutionally vague with respect to the offense of possessing more than 100 grams of a mixture containing methamphetamine.

[11] The 1988 edition of the United States Code provided two different penalties for the same offense. Specifically, § 841(b)(1)(A)(viii) provided for a 10–years–to–life sentence if the offense involved at least 100 grams of methamphetamine, or at least *100 grams* of a mixture containing methamphetamine. But subsection (B)(viii) provided for imprisonment of only 5–to–40–years if the offense involved at least 10 grams of methamphetamine, or at least *100 grams* of a mixture containing methamphetamine.[2]

We recently addressed this precise issue and held that the existence of these inconsistent penalties does not render § 841(b)(1) unconstitutionally vague. *United States v. Shaw*, 920 F.2d 1225, 1227–28 (5th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 2038, 114 L.Ed.2d 122 (1991); *United States v. Harris*, 932 F.2d 1529, 1535–36 (5th Cir. 1991) (relying on *Shaw*), *cert. denied*, 1991 WL 186045, — U.S. —, — S.Ct. —, — L.Ed.2d — (US). This is so because Congress defined clearly the conduct prohibited (possession of 100 grams of a substance containing methamphetamine), and defendants knew they faced imprisonment of at least five years. Thus appellants' constitutional challenge is without merit.

[12] This appeal is distinguishable from *Shaw* and *Harris*, however, because the district court in today's case did not apply the rule of lenity. The district court sentenced both appellants under subsection (A)(viii), which carries the more severe penalty. This directly affected David's sentence, raising his offense level under U.S.S.G. § 4B1.1 as a career offender from 34 to 37. This increased David's sentence by at least 73 months.[3] We therefore remand David's sentence so that the district court may resentence under § 841(b)(1)(B)(viii) rather than § 841(b)(1)(A)(viii).

The district court also sentenced Larry under the more stringent provision of (A)(viii). But, because he was not a career offender, Larry's guideline range was the same under (A)(viii) and (B)(viii) at 168–210 months. The district court sentenced Larry to 210 months, the very top of the guideline range. Because the district court sentenced Larry under subsection (A)(viii), which carries a more severe statutory penalty (life) than (B)(viii), we remand Larry's sentence as well so that the district court may reconsider whether it still wishes to sentence Larry at the top of the guideline range.

2. The duplication was apparently a clerical error. A 1990 amendment entitled "Correction of an Error Relating to the Quantity of Methamphetamine Necessary to Trigger a Mandatory Minimum Penalty" amended subsection (A)(viii) by substituting 1 kilogram (1000 grams) for the 100–gram mixture provision. P.L. No. 101–647, § 1202, 104 Stat. 4830 (Nov. 29, 1990). Thus under the current statute, the harsher penalties of subsection (A)(viii) are triggered only if ten times the quantity of pure methamphetamine or a mixture thereof is involved, as compared to subsection (B)(viii).

3. The Guideline range for Level 34, Category VI is 262–327 months; the range for Level 37 is 360-life. David received 400 months.

On remand the district court should also allow the government to point to evidence in the record that the 269 grams of methamphetamine seized on February 14 contained at least 100 grams of pure methamphetamine, was at least 37.175% pure. If the court so finds; then over 100 grams of pure methamphetamine were involved and the penalties of subsection (A)(viii) would be triggered.

E.

[13] Appellants next contend that their sentences are in error because methamphetamine is improperly classified as a Schedule II controlled substance. This argument is without merit.

The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-970 (the Act), established five schedules of controlled substances and specified the initial classification of substances in each schedule. Section 812(a). Methamphetamine originally was classified as a Schedule III controlled substance. The Act gives the Attorney General the authority to add, remove, or reclassify substances among the schedules pursuant to the procedures and criteria of § 811(a). Appellants maintain that methamphetamine was never properly reclassified to Schedule II because the Attorney General improperly delegated his authority to reclassify. We disagree. The Attorney General properly delegated his authority to the Director of the Bureau of Narcotics and Dangerous Drugs (BNDD) in 1970. 28 C.F.R. § 0.100 (1971). The Director of BNDD then reclassified methamphetamine as a Schedule II substance in 1971. 36 Fed.Reg. 12734. Thus, the Attorney General followed proper procedures in reclassifying methamphetamine as a Schedule II controlled substance. *See United States v. Roark*, 924 F.2d 1426, 1428–29 (8th Cir. 1991); *United States v. Kendall*, 887 F.2d 240 (9th Cir.1989); *United States v. Lane*, 931 F.2d 40 (11th Cir.1991).

[14] Appellants also argue that their sentences should have been based on methamphetamine as a Schedule III controlled substance because it was in powder, not liquid form. Although the initial statutory scheme classified methamphetamine as a Schedule II substance only if in injectable liquid form, methamphetamine has since been reclassified as a Schedule II substance even if in powder form. 21 C.F.R. § 1308.12(d) (1989). Appellants' objection, therefore, is without merit.

F.

[15] Finally, Larry Kinder contests his two-point enhancement under U.S.S.G. § 3B1.1(c) for being an "organizer, leader, manager, or supervisor" of a criminal activity. Larry contends that his role was no different from the other two participants. He argues that any dominance he had over the others stemmed from his relationship to them (boyfriend to Shook; older brother to David) rather than his role in the activity.

We review only for clear error the district court's finding that Larry was an organizer or leader. *United States v. Sarasti*, 869 F.2d 805, 806 (5th Cir.1989). Officer Moore testified that informants had advised authorities that Larry was in charge of David and Shook. Further, Shook informed Officer Goodwin at their initial meeting that she took care of Larry's dope business for him. At the February 14 transaction, Larry negotiated with Goodwin, instructed David to test the drugs, instructed David to give Goodwin the money, and instructed David to take the drugs outside and to wait for him. Thus the evidence is sufficient to support the district court's conclusion concerning Larry's leadership role.

III.

We affirm the district court's judgments in all but one respect. Unless the 269 grams of the mixture seized on February 14 contained 100 grams of pure methamphetamine, the district court should have applied the rule of lenity, i.e., sentenced appellants under the more lenient statute. We therefore vacate the sentence and remand this case to the district court to allow it to resentence the defendants accordingly.

The judgment of the district court is AFFIRMED IN PART and REMANDED IN PART for further proceedings consistent with this opinion.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed on December 9, 1991, to the following persons by deposit in the United States mails, first-class, postage-paid, addressed as follows:

LeRoy Morgan Jahn
Office of the U.S. Attorney
727 E. Durango, Ste. A-601
San Antonio, Texas 78206

Solicitor General
U. S. Department of Justice
Washington, D.C. 20530

Linda M. Gassaway

Nos. 91-6658 and 91-6659

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LARRY KINDER, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID KINDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court correctly calculated the amount of drugs used to determine petitioners' base offense level.

2. Whether the district court correctly adjusted petitioner Larry Kinder's sentence upward under Sentencing Guidelines § 3B1.1(c) based on his management or supervision of criminal activity.

3. Whether the government violated its plea agreements with petitioners.

4. Whether petitioners were entitled to a reduction in the base offense level under Sentencing Guidelines § 3E1.1 for acceptance of responsibility.

5. Whether methamphetamine has been properly classified as a Schedule II controlled substance.

IN THE SUPREME COURT OF THE UNITED STATES

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No. 91-6658

LARRY KINDER, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES
IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 549-557)[1/] is reported at 946 F.2d 362.

[1/] The pagination of the court of appeals opinion is the same in the appendix to each petition.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1991. The petitions for a writ of certiorari were filed on December 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, who are brothers, entered guilty pleas in the United States District Court for the Western District of Texas to the charge of conspiring to possess methamphetamine with intent to distribute it. Petitioner Larry Kinder was sentenced to 210 months' imprisonment, to be followed by a five-year term of supervised release, and he was fined $5,000. Petitioner David Kinder was sentenced to 400 months' imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. 549-557.

1. In February 1990, an informant advised Officer Floyd Goodwin of the Texas Department of Public Safety that petitioner Larry Kinder (Larry) was looking for a new source of supply for his methamphetamine distribution operation. The informant told Officer Goodwin that Sandra Kay Shook sold methamphetamine and collected the proceeds of the sale for Larry, but that Larry controlled the operation. According to the informant, Larry sold between one-half and one pound of methamphetamine per week in the Waco area. Pet. App. 552.

On February 8, 1990, Officer Goodwin negotiated by telephone with Larry and Shook to sell some methamphetamine. Shook subse-

quently went to Goodwin's hotel room. After advising Goodwin that she took care of most of Larry's "dope business" for him, Shook discussed a possible purchase from Goodwin of a quarter-pound of methamphetamine. Goodwin told Shook that the $2,600 offered was not worth his time, and he declined to sell. Shook then stated that she and Larry were not interested in purchasing a larger amount because they still had eight ounces of unsold methamphetamine, but that they would return later in the evening with more money. Pet. App. 552.

Shortly thereafter, Larry advised Goodwin by telephone that he was trying to raise the money to buy a half-pound of methamphetamine. Shook later telephoned Goodwin and told him that they had only $3,400. Goodwin refused to sell the quarter pound at that price. Shook told Goodwin that Larry would want to buy at least a half-pound of methamphetamine the following week. Pet. App. 552.

On February 14, Officer Goodwin was informed that Larry was ready to buy a half-pound of methamphetamine. That evening, Larry and his brother, petitioner David Kinder (David), met Goodwin and the informant in Goodwin's hotel room. Larry explained to Goodwin that he had not wanted to buy a large amount of methamphetamine the preceding week "because he had 17 ounces of methamphetamine on the street and had not collected all of the money from the sale of [it]." Larry told Goodwin that he wanted to buy a half-pound now, and that he might want more later. On Larry's instructions, David gave Goodwin some bundles of money,

telling Goodwin that there was $5,800 in the bundles. Pet. App. 552.

The informant retrieved the half-pound of methamphetamine from a dresser drawer. Larry instructed David to test the substance; David did so by snorting some and by injecting some into his arm with a syringe. David agreed that the methamphetamine was "good enough." At Larry's direction, David took the methamphetamine outside. The two brothers were then arrested. Pet. App. 552.

Petitioners pleaded guilty to one count of conspiring to possess more than 100 grams of methamphetamine with intent to distribute it. In exchange for the plea, the government promised not to prosecute petitioners for any additional offenses based on the facts then known to the government. Gov't C.A. Br. 13.

2. Larry's presentence report calculated that his Sentencing Guidelines range was 168-210 months' imprisonment, based on an adjusted offense level of 32 and a criminal history category of IV. Larry Kinder Presentence Report (LK Report) 8-11, 14. David's presentence report calculated that his Sentencing Guidelines range was 360 months to life imprisonment, based on an adjusted offense level of 37 and a criminal history category of VI. David Kinder Presentence Report (DK Report) 8-14, 22. The offense level for both petitioners was based on 750.95 grams of metamphetamine representing "the total amount for both the present offense and relevant conduct" under Sentencing Guidelines § 2D1.1. LK Report 8; DK Report 8.

The 750.95 gram amount was the sum of the 269 grams that were sold on February 14, plus the 481 grams (17 ounces) that Larry admitted to having "on the street." Petitioners objected to the inclusion of the 481 grams on the ground that there was no evidence that they possessed that amount of methamphetamine other than Larry's own "bare bone assertion," which they described as merely an excuse for not being able to produce sufficient funds to purchase Goodwin's methamphetamine on February 8, 1990. LK Report 20-21; DK Report 27-28.

Petitioners also objected to the reports' conclusion that they were not entitled to a two-point reduction under Sentencing Guidelines § 3E1.1 for acceptance of responsibility. LK Report 21-22; DK Report 28. Larry further objected to the conclusion in his presentence report that his offense level should be increased by two levels under Guidelines § 3B1.1 for his "managerial role" in the conspiracy. LK Report 22.

The probation officer declined to revise the presentence reports on any of these grounds. The officer noted that, "[i]n a drug distribution case such as this one, the guidelines allow for quantity and types of drugs not specified in the offense of conviction to be included in determining the offense level" if they were part of the same scheme or plan as the count of conviction. LK Report 21. The officer observed that Larry had readily admitted that he had 17 ounces of methamphetamine on the street, and that the 17 ounces were part of the scheme or plan that included the February 14 transaction. Moreover, there was

corroborating evidence for Larry's statement concerning the quantity of drugs he had for sale: Shook admitted to the authorities that she and Larry were trying to raise money by collecting for "previously purchased methamphetamine." She also stated that she and Larry had eight ounces of unsold methamphetamine. LK Report 21; DK Report 28.

The probation officer further found that neither Larry nor David was entitled to a reduction in his sentence for acceptance of responsibility. The officer explained that Larry had admitted only that he was involved in the February 14 sale and did not admit that he participated in any other acts of the conspiracy. Larry had attempted to minimize his role in the offense, and had failed satisfactorily to explain how he accumulated the money necessary for the drug purchase. LK Report 22. The officer found that David had also minimized his role in the conspiracy, claiming that his involvement was limited to the February 14 transaction. David further stated that he was unaware that his brother planned to purchase methamphetamine from Officer Goodwin on February 14. The probation officer explained, however, that investigative reports reflected that David was actually the money carrier for his brother, and that he must have known that his brother intended to make the February 14 sale. DK Report 28-29.

Finally, the probation officer rejected Larry's claim that he did not act in a managerial role, finding that both the investigative reports and petitioners' actions during the February 14 transaction established that Larry was the "central

figure controlling the drug negotiations and the decision maker as to when the transaction would occur." The probation officer also found that Larry "controlled the actions of the co-defendants throughout the drug conspiracy." LK Report 22.

At the sentencing hearing, the district court found that there was sufficient, reliable information that petitioners were responsible for the additional 17 ounces of methamphetamine, that Larry had a leadership role in the conspiracy, and that neither Larry nor David was entitled to a reduction for acceptance of responsibility. 10/3/90 Tr. 14-15, 17.

3. The court of appeals affirmed in part and remanded in part for further proceedings. The court held that it was not clearly erroneous for the district court to base its calculation of the petitioners' offense levels on the 750.95 gram amount of methamphetamine, which included the amount actually sold to Officer Goodwin and the 17 ounces of drugs Larry claimed to have "on the street." Pet. App. 553. The court rejected petitioners' claim that consideration of the 17 ounces violated petitioners' plea agreement. The court found that the government promised that it would not prosecute petitioners for any other offenses, and that to include the 17 ounces for sentencing purposes did not violate that promise. Id. at 554. In addition, the court found that petitioners were not entitled to a sentence reduction for acceptance of responsibility because they minimized their culpability for the offense charged and "denied their culpability for any criminal conduct beyond the specific offense charged."

Ibid. The court also found the evidence sufficient to support the district court's enhancement of Larry's offense level based on his leadership role in the conspiracy. Id. at 556-557.

Finally, the court rejected petitioners' contention that methamphetamine was improperly classified as a Schedule II controlled substance. The court found that although methamphetamine was originally classified as a Schedule III controlled substance, the Director of the Bureau of Narcotics and Dangerous Drugs had reclassified methamphetamine in 1971 as a Schedule II substance pursuant to a valid delegation of the Attorney General's reclassification authority under 21 U.S.C. 811(a). Pet. App. 556.[2/]

ARGUMENT

1. Petitioners claim (LK Pet. 6-12; DK Pet. 6-17) that the district court improperly calculated their base offense levels by

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[2/] The district court remanded the case to the district court for resentencing of both petitioners, because at the time of the offense, Title 21 provided two different penalties for overlapping offenses: Section 841(b)(1)(A)(viii) provided for a sentence of ten years to life imprisonment if the offense involved at least 100 grams of methamphetamine, or at least 100 grams of a mixture or substance containing methamphetamine, and Section 841(b)(1)(B)(viii) provided for a sentence of 5-40 years' imprisonment if the offense involved at least 10 grams of methamphetamine, or at least 100 grams of a mixture or substance containing methamphetamine. Because the district court sentenced petitioners under subsection (A)(viii), which carried the more severe penalty, the court of appeals remanded to allow the government to show that the 269 grams of methamphetamine seized on February 14 contained at least 100 grams of pure methamphetamine, in which case petitioners could be sentenced under subsection (A)(viii). Pet. App. 555-556. On remand, the government established that the 269 grams of methamphetamine contained approximately 200 grams of pure methamphetamine. Accordingly, the district court let stand petitioners' original sentences under subsection (A)(viii).

considering the 17 ounces of methamphetamine that Larry stated he had "on the street." Petitioners' argument appears to be both that it was error to consider quantities of methamphetamine other than the 269 grams involved in the February 14 transaction, and that there was insufficient evidence of their involvement with the additional 17 ounces of methamphetamine. The court of appeals correctly rejected these claims.

It was not error to consider quantities of methamphetamine in excess of the 269 grams involved in the February 14 sale. Under Guidelines § 2D1.1, the offense level for controlled substance offenses is based on the amount of drugs involved in the offense. The conduct underlying the offense of conviction in this case was not limited to the February 14 transaction. The count of the indictment to which petitioners pleaded guilty charged them with engaging in a conspiracy during the period from February 7 to February 14, 1990, to possess with intent to distribute more than 100 grams of methamphetamine. That count encompassed possession of any amounts of methamphetamine in excess of 100 grams with the intent to distribute it during the pertinent period. Evidence was presented in the presentence reports and at sentencing that petitioners had at least 17 ounces for sale during the period from February 8 to 14. Thus, petitioners were properly sentenced based on their possession of that amount. See Sentencing Guideline § 1B1.3(a)(1) (offense level should be based on all acts committed "in furtherance of [the] offense").

Even if possession of the 17 ounces is not considered part of the offense of conviction, the sentence was still properly calculated. The courts of appeals have agreed that the sentencing court is not limited to the drugs involved in the offense of conviction when calculating the offense level for a controlled substance offense. Under Guidelines § 1B1.3(a)(2), the court may calculate the sentence based on "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." See, e.g., United States v. Williams, 917 F.2d 112, 114 (3d Cir.), cert. denied, 111 S. Ct. 1001 (1991); United States v. Restrepo, 903 F.2d 648 (9th Cir. 1990), modified on other grounds, 946 F.2d 654 (1991); United States v. Rutter, 897 F.2d 1558, 1561-1562 (10th Cir.), cert. denied, 111 S. Ct. 88 (1990); United States v. White, 888 F.2d 490, 496-498 (7th Cir. 1989); United States v. Blanco, 888 F.2d 907, 909-911 (1st Cir. 1989); United States v. Ykema, 887 F.2d 697, 699 (6th Cir. 1989), cert. denied, 493 U.S. 1062 (1990); United States v. Scroggins, 880 F.2d 1204, 1211-1212 (11th Cir. 1989), cert. denied, 494 U.S. 1083 (1990); United States v. Williams, 880 F.2d 804, 805-806 (4th Cir. 1989); United States v. Mann, 877 F.2d 688, 690 (8th Cir. 1989); United States v. Taplette, 872 F.2d 101, 105-106 (5th Cir.), cert. denied, 493 U.S. 841 (1989); United States v. Guerrero, 863 F.2d 245, 248-250 (2d Cir. 1988).[3/]

[3/] Relying on United States v. Galloway, 943 F.2d 897 (8th Cir. 1991), and United States v. Miller, 910 F.2d 1321 (6th Cir.
(continued...)

In this case, there was sufficient evidence to support the district court's finding that petitioners were engaged in illicit activity involving amounts of metamphetamine apart from the quantity sold to Officer Goodwin. In explaining why he did not have ready cash to buy the full pound of methamphetamine that Officer Goodwin offered for sale, Larry told Goodwin that he had 17 ounces of methamphetamine "on the street." There was additional evidence that Larry's statement concerning this amount was not mere "puffery," as petitioners claim (see LK Pet. 10, DK Pet. 10): An informant had advised the authorities that Larry and Shook were well-known dealers of methamphetamine, selling from one-half to one pound of methamphetamine per week, and that Larry was looking for a new source of supply. Gov't C.A. Br. 9. Moreover, Shook advised Goodwin that Larry's organization was

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[3]/(...continued)
1990), cert. denied, 111 S. Ct. 980 (1991), petitioner David Kinder claims (DK Pet. 16) that "the Sentencing Commission has exceeded its authority under its enabling legislation and the United States Constitution by drafting Section 2D1.1 and 2D1.4 to encompass unconvicted criminal conduct." His reliance on those cases is misplaced. In Miller, the court rejected the defendant's claim that the court could not base its sentence on quantities of drugs not specified in the count of conviction. Presumably, petitioner is relying on Judge Merritt's dissent in that case. In Galloway, the court held that the Sentencing Commission lacked statutory authority to promulgate Sentencing Guidelines § 1B1.3, which requires district courts to consider "related conduct" not encompassed by the offense of conviction in determining the defendant's offense level. On November 20, 1991, however, the court vacated its judgment and granted rehearing en banc. The only other courts of appeals to consider the issue have concluded that the Sentencing Commission did not exceed its statutory authority in promulgating Guidelines § 1B1.3. See United States v. Thomas, 932 F.2d 1085, 1087-1089 (5th Cir. 1991), cert. denied, 112 S. Ct. 887 (1992); United States v. Ebbole, 917 F.2d 1495, 1501 (7th Cir. 1990).

trying to raise money for the February 14 purchase by collecting on previous sales, and she added that she and Larry had eight ounces of unsold methamphetamine. From that evidence the district court could properly find that petitioners were responsible for quantities of methamphetamine above the amount involved in the February 14 transaction, and that the involvement extended to the 17 ounces mentioned by Larry.[4]/

Petitioner David Kinder argues (DK Pet. 12-16) that the 17 ounces of methamphetamine should be attributed to his brother, but not to him, since the government failed to prove that he was linked to the additional quantity of drugs. As the court of appeals found (Pet. App. 554), the evidence showed that David worked closely with Larry: he brought the money for the February 14 transaction, he tested the drugs with his own syringe, and he took possession of the drugs. Moreover, he was present when Larry advised Officer Goodwin that he had 17 ounces of metham-

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[4]/ Petitioners urge (Pets. 9) this Court to adopt a "clear and convincing evidence" standard of proof for factual findings at sentencing. The courts of appeals, however, have ruled that the preponderance of the evidence standard ordinarily applies to findings of fact under the Guidelines. United States v. Wilson, 900 F.2d 1350, 1353-1354 (9th Cir. 1990); United States v. Frederick, 897 F.2d 490, 491-493 (10th Cir.), cert. denied, 111 S. Ct. 171 (1990); United States v. Alston, 895 F.2d 1362, 1372-1373 (11th Cir. 1990); United States v. Howard, 894 F.2d 1085, 1089-1090 (9th Cir. 1990); United States v. Carroll, 893 F.2d 1502, 1506 (6th Cir. 1990); United States v. Blanco, 888 F.2d 907, 909 (1st Cir. 1989); United States v. White, 888 F.2d 490, 499 (7th Cir. 1989); United States v. McDowell, 888 F.2d 285, 290-291 (3d Cir. 1989); United States v. Guerra, 888 F.2d 247, 250-251 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990); United States v. Ehret, 885 F.2d 441, 444 (8th Cir. 1989), cert. denied, 493 U.S. 1062 (1990); United States v. Urrego-Linares, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S. 943 (1989).

phetamine on the street. When asked by Larry if the methamphetamine was "good enough," David nodded enthusiastically, thus suggesting extensive previous experience with methamphetamine. From these circumstances, the district court could properly infer that David's involvement in his brother's methamphetamine operation extended beyond the February 14 transaction, and that he was therefore responsible for amounts of methamphetamine in excess of the 269 grams sold in the February 14 transaction.

2. Petitioners claim (LK Pet. 15-17; DK Pet. 18-20) that, in recommending that the court take into account amounts of methamphetamine other than the amount involved in the February 14 transaction, the government violated its agreement not to prosecute them for offenses other than the one to which they pleaded guilty. As already explained, the conduct underlying the offense of conspiracy to which petitioners pleaded guilty included petitioners' possession of amounts of drugs in excess of the quantity sold to Officer Goodwin. Thus, consideration of that amount at sentencing did not violate petitioners' plea agreement. In any event, the plea agreement imposed no obligation on the government to disregard related criminal conduct in recommending a sentence for the offense of conviction. As the court of appeals correctly stated, consideration of amounts of drugs in excess of the amount involved in the offense of conviction for sentencing purposes is not equivalent to prosecution for offenses involving the greater amounts. See United States v. Jimenez, 928 F.2d 356, 363-364 (10th Cir.), cert. denied, 112 S. Ct. 164 (1991); United States v. Rodriguez, 925 F.2d 107, 112 (5th Cir. 1991); United States v. Smallwood, 920 F.2d 1231, 1239-1240 (5th Cir.), cert. denied, 111 S. Ct. 2870 (1991); United States v. Salazar, 909 F.2d 1447, 1448-1449 (10th Cir. 1990).

In the alternative, petitioners argue (LK Pet. 17; DK Pet. 20) that their guilty pleas were not knowing and voluntary because they were entered under a misapprehension as to the amount of drugs that would be considered in setting their sentence. That claim is unavailing. Prior to accepting their guilty pleas, the district court advised petitioners of the nature of the charge to which they were pleading guilty and the maximum punishment they faced. Petitioners were advised that they could be sentenced to life imprisonment, that the offense to which they were pleading guilty carried a mandatory minimum punishment of ten years' imprisonment, and that the Guidelines would determine the applicable sentencing range. 6/25/90 Tr. 6-7, 18-21. Petitioners assured the court that their pleas had been induced by no promises other than that contained in their plea agreements, and that no one had made any promise or prediction as to what their sentences would be. Id. at 21-23. In these circumstances, the court of appeals properly found that petitioners' guilty pleas were voluntary.

3. Petitioners argue (LK Pet. 18-19; DK Pet. 21-22) that they were entitled to a two-point reduction in their offense levels under Guidelines § 3E1.1 for acceptance of responsibility. Their argument appears to be that the entry of a plea of guilty

"effectively creates a presumption" that such a reduction will be given.[1/] Petitioners are mistaken. Guidelines § 3E1.1(c) expressly states that "[a] defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right." Accord § 3E1.1, Application Note 3 ("Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility for the purposes of this section. However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility."). In addition, Application Note 5 to Guidelines §§ 3E1.1 explains that, because the sentencing judge occupies "a unique position to evaluate a defendant's acceptance of responsibility," the judge's determination whether the defendant is entitled to the reduction is "entitled to great deference on review." See United States v. Harris, 882 F.2d 902, 905 (4th Cir. 1989) (whether a defendant has accepted responsibility is a factual question subject to review under the clearly erroneous standard); United States v. Wilson, 878 F.2d 921, 923 (6th Cir. 1989) (same); United States v. Franco-Torres, 869 F.2d 797, 799 (5th Cir. 1989) (same).

[1/] Petitioners also claim (LK Pet. 19; DK Pet. 22) that the government rejected their offer for a "debrief[ing]," and that the government should not be allowed to defeat the acceptance of responsibility reduction by rejecting their offer of assistance. The record establishes, however, that the government declined the offer of assistance because it believed petitioners were being untruthful. 10/3/90 Tr. 15.

Although Larry admitted being involved in the single drug transaction of February 14, he did not admit being part of any other acts of the conspiracy, and he attempted to minimize his overall role in the offense. For example, he failed to explain how he had accumulated the money necessary for the February 14 drug purchase. David also minimized his role in the conspiracy, stating that he was unaware that his brother planned to purchase methamphetamine from Officer Goodwin on February 14. The district court was therefore correct in concluding that petitioners did not merit the two-level reduction for acceptance of responsibility. Petitioners also complain (LK Pet. 21-22; DK Pet. 18-19) that requiring them to admit to incriminating conduct in order to obtain an acceptance of responsibility reduction under Guidelines § 3E1.1 violated their Fifth Amendment privilege against compelled self-incrimination. To the extent that petitioners claim that requiring them to accept responsibility for the offense of conviction violated their Fifth Amendment rights, their claim is without support. When a defendant pleads guilty to a crime, he waives his privilege as to the acts underlying the offense. Namet v. United States, 373 U.S. 179, 188-189 (1963); United States v. Frierson, 945 F.2d 650, 656 (3d Cir. 1991), cert. denied, No. 91-6849 (Mar. 23, 1992); United States v. Rodriguez, 706 F.2d 31 (2d Cir. 1983); United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982).

If petitioners' claim is that it violates the Fifth Amendment to deny them a reduction in sentence unless they admit

responsibility for conduct that is not part of the offense of conviction, this case would still not merit the Court's review. The district court refused to reduce the sentence because petitioners were unwilling to admit to any activities apart from the February 14 transaction. As already explained, the conduct of conviction is not confined to that transaction. Thus, the court's refusal to reduce sentence for failure to admit conduct other than the sale of drugs to Goodwin does not necessarily penalize petitioners for failing to admit their involvement in other offenses, since the conduct that they declined to admit included conduct that was encompassed by the charged conspiracy to which they pleaded guilty.

Even if the offense of conviction encompassed only the February 14 transaction, this case would still not present an occasion to decide whether it would violate the Fifth Amendment to interpret Guidelines § 3E1.1 to require a defendant to admit to unconvicted conduct to obtain a reduced sentence. See, e.g., United States v. Oliveras, 905 F.2d 623, 626-628 (2d Cir. 1990) (finding Fifth Amendment violation); United States v. Perez-Franco, 873 F.2d 455, 463 (1st Cir. 1989). Petitioners were denied an adjustment based, inter alia, on the district court's conclusion that petitioners had not been truthful in denying their culpability for any criminal conduct extending beyond that transaction. Accordingly, this case is not a good vehicle for addressing the Fifth Amendment implications of Guideline § 3E1.1. See Bryson v. United States, 396 U.S. 64, 72 (1969) ("It cannot

be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the government's right to ask questions --lying is not one of them."). As one court of appeals explained in similar circumstances:

> The district judge made a credibility determination that was not clearly erroneous. We therefore need not reach the fifth amendment issue. Should some future [defendant] demonstrate sincerity and remorse while at the same time he declines to expound upon other criminal conduct because of a concern with self-incrimination, then perhaps the issue will be squarely presented.

United States v. Taylor, 937 F.2d 676, 681 (D.C. Cir. 1991); accord United States v. Frierson, 945 F.2d at 660-662.

4. There is also no merit in petitioner Larry Kinder's challenge (LK Pet. 13-14) to the two-level increase under Guidelines § 3B1.1(c) for his role as an "organizer, leader, manager, or supervisor in any criminal activity * * *." See United States v. Herrera, 878 F.2d 997, 1000-1002 (7th Cir. 1989) (two-level increase upheld where husband supervised wife in possessing with intent to distribute cocaine). The finding that a defendant is a manager or supervisor of criminal activity is essentially factual, see United States v. Fuentes-Moreno, 895 F.2d 24, 26 (1st Cir. 1990); United States v. Mejia-Orosco, 867 F.2d 216, 221 (5th Cir.), cert. denied, 492 U.S. 924 (1989), and should be upheld if it is not clearly erroneous, United States v. White, 875 F.2d 427, 432 (4th Cir. 1989).

The evidence clearly supported the district court's conclusion that Larry occupied a leadership role. Investigator Moore testified at the sentencing hearing that informants had advised law enforcement authorities that Larry was in charge of an extensive methamphetamine operation. Shook informed Officer Goodwin that she took care of Larry's dope business for him. Finally, during the February 14 transaction, it was Larry who negotiated with Goodwin and issued orders to his brother.

Petitioner asserts, however, that his dominance, if any, was the natural consequence of his romantic relationship with Shook and his position as David's older brother. Whatever the psychological or interpersonal underpinnings of Larry's leadership role, however, they do not alter or excuse that role. 5.

Finally, petitioners contend (LK Pet. 20-22; DK Pet. 23-25) that methamphetamine has never been lawfully reclassified as a Schedule II controlled substance. That claim is without merit.

The Controlled Substances Act of 1970, 21 U.S.C. 801 et seq., established five schedules of controlled substances and assigned an initial schedule to each controlled substance. 21 U.S.C. 812(a). Section 201(a) of the Act authorized the Attorney General to add or remove substances from the schedules, or to move substances from one schedule to another, in accordance with certain specified statutory procedures. 21 U.S.C. 811(a). See generally Touby v. United States, 111 S. Ct. 1752, 1754 (1991). Under the authority of 21 U.S.C. 871(a) and 28 U.S.C. 510, the Attorney General in 1971 delegated the reclassification authority

to the Director of the Bureau of Narcotics and Dangerous Drugs (BNDD). 28 C.F.R. 0.100 (1971).

Following the procedures outlined in the Act, the Director of BNDD transferred all methamphetamine from Schedule III to Schedule II. On May 26, 1971, the Director published a notice in the Federal Register of the proposed transfer. 36 Fed. Reg. 9563 (1971). The Director stated that the proposed transfer was based upon the agency's investigation and "upon the scientific and medical evaluation and recommendation of the Secretary of Health, Education and Welfare * * *."

On July 7, 1971, the Director's order transferring all forms of methamphetamine from Schedule III to Schedule II was published in the Federal Register. 36 Fed. Reg. 12,734 (1971). The order set forth the factual findings required by 21 U.S.C. 812(b)(2) to reschedule methamphetamine: that methamphetamine had a high potential for abuse, that it had a limited acceptable medical use, and that abuse of the drug could lead to severe psychological or physical dependence. Thus, in reclassifying methamphetamine as a schedule II drug in 1971, BNDD complied with all the statutory requirements.[1/] Each court of appeals that has

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[1/] Petitioners' reliance (LK Pet. 21-22; DK Pet. 24-25) on United States v. Widdowson, 916 F.2d 587 (10th Cir. 1990), is misplaced. There, the court held, inter alia, that the Attorney General lacked statutory authority to subdelegate to the Administrator of the DEA his Section 201(h) powers temporarily to schedule a drug. This Court vacated and remanded that case for further consideration in light of its decision in Touby v. United States, 111 S. Ct. 1752 (1991), that the Attorney General did not improperly delegate his temporary scheduling power to the DEA. 112 S. Ct. 39 (1991).

considered the issue has agreed with the conclusion that methamphetamine was properly reclassified from Schedule III to Schedule II. See United States v. Lane, 931 F.2d 40, 41 (11th Cir. 1991); United States v. Roark, 924 F.2d 1426, 1429 (8th Cir. 1991); United States v. Kendall, 887 F.2d 240, 241 (9th Cir. 1989); see also United States v. Roya, 574 F.2d 386, 392-393 (7th Cir.), cert. denied, 439 U.S. 857 (1978).[1/]

[1/] A few courts have incorrectly stated that the DEA reclassified methamphetamine as a Schedule II drug in 1974. See United States v. Schrock, 855 F.2d 327, 332 (6th Cir. 1988); United States v. Jones, 852 F.2d 1235, 1236-1237 (9th Cir. 1988); United States v. Burnes, 816 F.2d 1354, 1358 (9th Cir. 1987). The only authority cited for the proposition that the reclassification occurred in 1974 is 39 Fed. Reg. 22,142. However, that citation to the Federal Register shows only that on June 20, 1974, the DEA, as required by statute (21 U.S.C. 812(a)), updated and republished its list of scheduled substances.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

DEBORAH WATSON
Attorney

MARCH 1992

SUPREME COURT OF THE UNITED STATES

LARRY KINDER *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91-6658. Decided May 26, 1992

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

Petitioner Larry Kinder presents three issues related to his guilty plea and sentence for conspiring to possess methamphetamine with intent to distribute: (1) the burden of proof at the sentencing hearing; (2) district court reliance on conduct made the basis of counts dismissed pursuant to a plea bargain; and (3) Fifth Amendment self-incrimination implications of the acceptance of responsibility guideline, United States Sentencing Commission, Guidelines Manual (USSG), §3E1.1 (Nov. 1991). The Courts of Appeals have come into conflict on each of these issues, which reflect important and recurring problems in procedures under the Sentencing Guidelines. For the following reasons, I would grant the petition for certiorari as to each of these issues.

Petitioner was arrested following an undercover investigation into major methamphetamine dealers in the area of Waco, Texas. During the operation, petitioner expressed to an undercover officer that he had not wanted to buy a large amount "'because he had 17 ounces of methamphetamine on the street and had not collected all of the money from the sale of [it].'" 946 F. 2d 362, 365 (CA5 1991). Instead, petitioner, with the assistance of his brother, David,[1] purchased approximately one-half pound (269 grams) of methamphetamine. Following arrest, petitioner pleaded guilty to a one-count indictment of conspiring to possess more than 100 grams of methamphetamine with intent to distribute. 21 U. S. C. §§ 846 and 841(a)(1). In exchange for the plea, the government promised not to prosecute him for any additional offenses. At sentencing, however, when calculating the base offense level, the District Court included, upon recommendation by the government, the noncharged 17 ounces (481.93 grams) of methamphetamine of which petitioner had spoken. The District Court also declined to grant petitioner a downward adjustment for acceptance of responsibility, in part because he refused to admit to possession of this additional methamphetamine.

[1] David Kinder's petition for certiorari, No. 91-6659, presented the same issues raised by his brother here, and was denied on April 20, 1992, 503 U. S. ——.

A

Before the Fifth Circuit, petitioner asserted that, when including the noncharged amounts of methamphetamine as relevant conduct which raised his base offense level from 26 to 30 points, the District Court relied on evidence lacking sufficient indicia of reliability to meet the dictates of due process. See *Townsend* v. *Burke*, 334 U. S. 736, 741 (1948); USSG §6A1.3, p.s. (resolution of disputed factors requires information with "sufficient indicia of reliability to support its probable accuracy"). Petitioner argued that his statement was mere "puffery" that lacked corroboration, emphasizing that he made such statements only to engender confidence in his distribution capabilities.

Like most Courts of Appeals, the Fifth Circuit requires district courts to determine its factual findings at sentencing by a preponderance of the evidence, which findings are reviewed on appeal solely for clear error. *United States* v. *Angulo*, 927 F. 2d 202, 205 (1991); see also *United States* v. *Blanco*, 888 F. 2d 907, 909 (CA1 1989); *United States* v. *Guerra*, 888 F. 2d 247, 250–251 (CA2 1989), cert. denied, 494 U. S. 1090 (1990); *United States* v. *Urrego-Linares*, 879 F. 2d 1234, 1237–1238 (CA4), cert. denied, 493 U. S. 943 (1989); *United States* v. *Carroll*, 893 F. 2d 1502, 1506 (CA6 1990); *United States* v. *White*, 888 F. 2d 490, 499 (CA7

1989); *United States* v. *Frederick*, 897 F. 2d 490, 491–493 (CA10), cert. denied, 498 U. S. — (1990); *United States* v. *Alston*, 895 F. 2d 1362, 1372–1373 (CA11 1990). However, at least one Circuit has held, *United States* v. *Kikumura*, 918 F. 2d 1084, 1098–1102 (CA3 1990), and two have suggested, *United States* v. *Townley*, 929 F. 2d 365, 369–370 (CA8 1991); *United States* v. *Restrepo*, 946 F. 2d 654, 661, n. 12 (CA9 1991) *(en banc)*, cert. denied, 503 U. S. — (1992); *Restrepo*, 946 F.2d, at 661–663 (Tang, J., concurring), *id.*, at 664–679 (Norris, J., dissenting), that a clear and convincing evidence standard is appropriate when the relevant conduct offered at sentencing would dramatically increase the sentence.[2] Cf. *id.*, at 663–664 (Pregerson, J., dissenting) (advocating beyond reasonable doubt standard). However, even these Circuits recognize that the preponderance standard ordinarily pertains. See *United States* v. *McDowell*, 888 F. 2d 285, 290–291 (CA3 1989); *United States* v. *Sleet*, 893 F. 2d 947, 949 (CA8 1990); *United States* v. *Wilson*, 900 F. 2d 1350, 1353–1354 (CA9 1990).

In a marginal case, such a difference in the standard of review could well prove dispositive, especially where, as in the Fifth Circuit, "[a] defendant who objects to the use of information bears the burden of proving that it is 'materially untrue, inaccurate or unreliable.'" 946 F. 2d, at 366 (quoting *Angulo*, 927 F. 2d, at 205). The Sentencing Guidelines do not explicitly adopt a standard of proof required for relevant conduct, and we have not visited this

[2] Whether any Circuit would consider petitioner's heightened exposure here "dramatic" is open to question. Petitioner had a criminal history category of IV. Brief for United States 4. Looking only to the increase in the unadjusted base offense level from 26 to 30 shows an increase in his guideline range from 92–115 to 135–168 months of imprisonment. In real terms, then, the District Court's acceptance of the controverted statement as probative evidence for sentencing purposes exposed petitioner to roughly four additional years' imprisonment—a 50% increase. Cf. *United States* v. *Kikumura*, 918 F. 2d 1084, 1102 (CA3 1990) (12-fold, 330-month departure from the median of an applicable guideline range).

issue since its new procedures took effect in November 1987. See *McMillan* v. *Pennsylvania*, 477 U. S. 79, 91–93 (1986) (preponderance standard for sentencing enhancements satisfies due process). The burden of proof at sentencing proceedings is an issue of daily importance to the district courts, with implications for all sentencing findings, whether they be the base offense level, specific offense characteristics, or any adjustments thereto, or even to those facts found to warrant departure altogether. The resolution of disputed matters at sentencing obviously has serious implications for both the defendant and the Government, as it controls the length of sentence actually to be imposed. I would grant certiorari to clarify the applicable standards under the new sentencing regime.

B

Petitioner also argued that the Government violated his plea agreement not to prosecute him for additional offenses by recommending inclusion of the additional 17 ounces of methamphetamine in sentencing.[3] The Fifth Circuit rejected this argument, finding the government to have kept its promise by *prosecuting* only the 269 grams involved in the actual sale. "Inclusion of the other 17 ounces in sentencing," the Fifth Circuit held, "is not equivalent to prosecution." 946 F. 2d, at 367 (citing *United States* v. *Rodriguez*, 925 F. 2d 107, 112 (CA5 1991)); see also *United States* v. *Kim*, 896 F. 2d 678, 684 (CA2 1990); *United States* v. *Frierson*, 945 F. 2d 650, 654–655 (CA3 1991), cert. denied, 503 U. S. — (1992); *United States* v. *Smallwood*, 920 F. 2d 1231, 1239–1240 (CA5), cert. denied, 501 U. S. —

[3] Petitioner's plea bargain in pertinent part stated: "'In exchange for Defendant's plea, the United States Attorney agrees to refrain from prosecuting Defendant for other Title 21, United States Code, violations of which the United States is now aware, which may have been committed by the Defendant in the Western District of Texas. That is, this action now pending is the extent of the Federal prosecution against the Defendant in the Western District of Texas based upon all facts at hand.'" Pet. for Cert. 15 (emphasis omitted).

(1991); *United States* v. *Jimenez*, 928 F. 2d 356, 363–364 (CA10), cert. denied, 502 U. S. — (1991); *United States* v. *Salazar*, 909 F. 2d 1447, 1448–1449 (CA10 1990); *United States* v. *Scroggins*, 880 F. 2d 1204, 1212–1214 (CA11 1989). The Fifth Circuit also rejected petitioner's argument that the government misrepresented that his base offense level would be based only on 269 grams, finding instead that the guilty plea was voluntary because the District Court informed him of the maximum possible statutory punishment he faced. 946 F. 2d, at 367 (citing *United States* v. *Pearson*, 910 F. 2d 221, 223 (CA5 1990), cert. denied, 498 U. S. — (1991)). To the contrary, the Ninth Circuit has several times held that the government may not introduce counts dismissed as part of a plea bargain in order to increase the sentence. *United States* v. *Faulkner*, 952 F. 2d 1066, 1069–1071 (1991); *United States* v. *Fine*, 946 F. 2d 650, 651–652 (1991); *United States* v. *Castro-Cervantes*, 927 F. 2d 1079, 1081–1082 (1991).

The issue is of considerable importance. Petitioner pleaded guilty to conspiring to possess more than 100 grams of methamphetamine with intent to distribute, and with that plea he could expect a mandatory minimum sentence of ten years imprisonment, with the possibility of a life term. 21 U. S. C. §841(b)(1)(A)(viii). As to this substantive count of conviction, there is no distinction to be drawn between 269 grams and 751 grams of methamphetamine. But as to sentencing, the distinction is of the utmost importance, because *where* the exact sentence will fall between ten years and life depends largely on the base offense level, USSG §2D1.1(a)(3), which derives *solely* from the amounts listed in the Drug Quantity Table. *Compare* §2D1.1(c)(7) (base offense level 30 for "[a]t least 700 G but less than 1 KG of Methamphetamine"), *with* §2D1.1(c)(9) (base offense level 26 for "[a]t least 100 G but less than 400 G of Methamphetamine"). The question is whether a plea bargain that deletes conduct from the offense of conviction nevertheless permits that conduct to be fully punished in the sentence for the conviction from which the conduct was supposedly deleted. Because this substantial issue frequently recurs, and because of the apparent conflict in the Circuits, I would grant certiorari on this issue as well.

C

Finally, petitioner argued that the District Court erred in refusing to reduce his base offense level for acceptance of responsibility. See USSG §3E1.1. The Fifth Circuit affirmed the District Court, finding, *inter alia*, that he "ha[s] denied [his] culpability for any criminal conduct beyond the specific offense charged," and specifically that he "continue[s] to deny any involvement in the extra 17 ounces." 946 F. 2d, at 367. Petitioner protests that requiring him to admit to incriminating conduct abridges the protections of the Fifth Amendment. The Fifth Circuit has disagreed with this assertion, see *United States* v. *Mourning*, 914 F. 2d 699, 706–707 (1990), as have the Fourth and Eleventh Circuits. See *United States* v. *Gordon*, 895 F. 2d 932, 936–937 (CA4), cert. denied, 498 U. S. — (1990); *United States* v. *Henry*, 883 F. 2d 1010, 1011–1012 (CA11 1989). Firmly to the contrary are the First, Second, and Ninth Circuits, which have determined that conditioning the acceptance of responsibility reduction on confession of uncharged conduct denies the defendant his right against self-incrimination. *United States* v. *Perez-Franco*, 873 F. 2d 455 (CA1 1989); *United States* v. *Oliveras*, 905 F. 2d 623 (CA2 1990); *United States* v. *Piper*, 918 F. 2d 839, 840–841 (CA9 1990). See also *United States* v. *Frierson*, *supra* (§3E1.1 implicates Fifth Amendment protections, but defendant must invoke the privilege and not simply lie in response to questioning regarding related conduct); *United States* v. *Rogers*, 899 F. 2d 917, 924 (CA10), cert. denied, 498 U. S. —, — (1990) (dictum approving *Perez-Franco*).

Amendments to this guideline have not mended the split between the Circuits. Cf. *Braxton* v. *United States*, 500 U. S. — (1991). In any event, this is not a question of the mere application or simple interpretation of this Guideline, but is instead a recurring issue of constitutional dimension, where the varying conclusions of the Courts of Appeals

determines the length of sentence actually imposed. I would also grant certiorari on this issue.